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17-P-835

Appeals Court

ALLISON ST. LAURENT & another<sup>1</sup> vs. MIDDLEBOROUGH GAS & ELECTRIC  
DEPARTMENT.

No. 17-P-835. April 4, 2018.

Municipal Corporations, Municipal electric plant, Governmental immunity. Middleborough. Massachusetts Tort Claims Act.  
Statute, Construction.

Middleborough Gas & Electric Department (MGED) appeals from a Superior Court order denying its motion to dismiss for lack of presentment. The motion judge denied the motion on the ground that MGED is not a "public employer" subject to the Massachusetts Tort Claims Act, and thus the presentment requirement of G. L. c. 258, § 4, did not apply. We disagree and remand so that the Superior Court can address whether the presentment requirement was satisfied on the facts here.

1. Background.<sup>2</sup> The complaint alleges that the plaintiffs were injured in October, 2013, when a ladder they were near came into contact with an "arc[ing]" electrical current. They claim that the current came from an "improperly grounded" line

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<sup>1</sup> Richard Mansueto.

<sup>2</sup> This appeal is properly before us under the doctrine of present execution. See Rodriguez v. Somerville, 472 Mass. 1008, 1009-1010 (2015) (doctrine of present execution allows interlocutory order to be immediately appealable in cases involving claims of immunity from suit under G. L. c. 258); Coren-Hall v. Massachusetts Bay Transp. Authy., 91 Mass. App. Ct. 77, 78 n.5 (2017) (appeal properly before this court from denial of summary judgment motion based upon lack of proper presentment).

maintained by MGED, and that MGED was negligent. Between November, 2013, and July, 2015, and prior to filing suit, the plaintiffs' attorney communicated with representatives of MGED multiple times, both orally and in writing. Eventually efforts at presuit resolution failed, and the plaintiffs filed this lawsuit on April 19, 2016.

MGED filed a motion to dismiss, arguing that the plaintiffs had failed to make presentment as required by the Massachusetts Tort Claims Act, G. L. c. 258, § 4. The plaintiffs responded (1) that no presentment was required because MGED is not a "public employer" as defined in G. L. c. 258, § 1, as amended by St. 1993, c. 110, § 227, and thus the Tort Claims Act does not apply and (2) that in any event the plaintiffs had satisfied the presentment requirement through correspondence with representatives of MGED. The motion judge denied MGED's motion on the ground that MGED was not a public employer, but rather was a "commercial business."

2. Discussion. The question before us turns on the definition of "public employer," found at c. 258, § 1, which provides that "public employer" includes "any . . . town . . . and any department . . . thereof . . . including a municipal gas or electric plant." In construing a statute we begin with its plain language, and we think the language here admits of only one interpretation. See Commonwealth v. Stewart-Johnson, 78 Mass. App. Ct. 592, 600 (2011) ("A statute is to be interpreted according to the plain and ordinary meaning of its words" [quotation omitted]). MGED is a department of the town of Middleborough, and it is a "gas or electric plant." It squarely meets the statutory definition.<sup>3</sup>

The plaintiffs urge us to reach a contrary result based upon other language in the "public employer" definition that excludes "the Massachusetts Port Authority, or any other independent body politic and corporate" (emphasis added). See G. L. c. 258, § 1. The plaintiffs argue that MGED is one such "independent" entity. They rely in particular on a Supreme Judicial Court decision, Middleborough v. Middleborough Gas & Elec. Dept., 422 Mass. 583, 587-588 (1996), that dealt

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<sup>3</sup> The language at issue -- "including a municipal gas or electric plant" -- was not in the Tort Claims Act's original definition of "public employer." The language was added by amendment in 1993. St. 1993, c. 110, § 227. We have not been pointed to, nor have we found, any history explaining the addition.

specifically with MGED, and in which the court held that the town of Middleborough and MGED could be treated as sufficiently separate so that the town could sue MGED for losses from a fire it allegedly caused.

Neither Middleborough nor the cases that succeed it support the position that the defendant gas and electric plant is not a "public employer" under the Tort Claims Act. In Middleborough, 422 Mass. at 588, the Supreme Judicial Court expressly stated that it was not deciding whether the Tort Claims Act applied in suits against MGED. Furthermore, the court specifically noted that the amendment to the "public employer" definition that we rely upon here, adding gas and electric plants, postdated the cause of action at issue in Middleborough. See ibid. Subsequently, in DeRoche v. Massachusetts Commn. Against Discrimination, 447 Mass. 1, 10 (2006), the Supreme Judicial Court held that the Wakefield Municipal Gas & Light Department was a "public entity" for purposes of a different Massachusetts statute. In so holding the court relied, in part, on the fact that "[t]he Legislature has specifically placed the [gas and light] department in the class of entities subject to the Tort Claims Act, thereby reflecting its view that the department is in that class of entities afforded the protections of sovereign immunity." Ibid. The court went on to consider and distinguish the Middleborough decision, concluding that "as a legal and practical matter, the [gas and electric] department is a department of the town and, like the town, is a public entity." Id. at 11.

We conclude likewise here. In construing the term "public employer" in G. L. c. 258, § 1, we cannot read the language excluding "other independent bod[ies]" to override the inclusion of "municipal gas or electric plant[s]." See Commonwealth v. Burgess, 426 Mass. 206, 224-225 (1997), quoting from United States v. Menasche, 348 U.S. 528, 538-539 (1955) ("One of the cardinal principles of statutory construction is to give effect, if possible, to every clause and word of a statute"). Moreover, to the extent that the two clauses might be said to conflict, the exclusion, which is general, must yield to the inclusion, which is specific. See TBI, Inc. v. Board of Health of N. Andover, 431 Mass. 9, 18 (2000), quoting from Risk Mgmt. Foundation of Harvard Med. Insts., Inc. v. Commissioner of Ins., 407 Mass. 498, 505 (1990) ("[G]eneral statutory language must yield to that which is more specific"). See also Doe v. Attorney Gen. (No. 1), 425 Mass. 210, 215 (1997) ("[W]hen two statutes [or provisions within those statutes] conflict, we have stated that the more specific provision, particularly where it

has been enacted subsequent to a more general rule, applies over the general rule").

Accordingly, MGED is a "public employer" subject to the Tort Claims Act. That leaves, on remand, the question whether the presentment requirement was nevertheless satisfied on the facts of this case -- in particular, through the correspondence between the plaintiffs' counsel and MGED's representatives. That issue was not reached by the motion judge, and we do not reach it here.<sup>4</sup> The order denying the motion to dismiss is vacated, and the matter is remanded for further proceedings consistent with this opinion.

So ordered.

Nicholas J. Scobbo, Jr., for the defendant.  
Dana Alan Curhan for the plaintiffs.

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<sup>4</sup> We note that the correspondence presents the unusual fact that MGED's outside counsel explicitly told the plaintiffs to "direct all future correspondence concerning this incident to [his] attention," a directive that may be relevant to the question of presentment on remand. Cf. Carifio v. Watertown, 27 Mass. App. Ct. 571, 572-576 (1989).